



Office of the Attorney General  
State of Texas

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ATTORNEY GENERAL

July 24, 1996

Mr. Leonard W. Peck, Jr.  
Assistant General Counsel  
Legal Affairs Division  
Texas Department of Criminal Justice  
P.O. Box 99  
Huntsville, Texas 77342-0099

OR96-1263

Dear Mr. Peck:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 37840.

The Texas Department of Criminal Justice (the "department") received a request for certain documents which were the subject of the department's requests for bids in October 1995 to operate in-prison drug treatment facilities. You provided the documents for our review and you contend the requested information is excepted from required public disclosure under sections 552.104 and 552.110 of the Government Code.

Pursuant to section 552.305, we also notified Correctional Medical Systems, Gateway Foundation and Wackenhut, the parties whose proprietary interests may be implicated by this request. *See* Gov't Code §552.305; Open Records Decision No. 542 (1990). A response was received from Gateway.

Section 552.104 excepts information that, if released, would give advantage to a competitor or bidder. The purpose of this exception is to protect the interests of a governmental body in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Section 552.104 is also generally invoked to protect the integrity of the competitive bidding process and to preserve the advantages it offers a governmental body. Open Records Decision No. 541 (1990) at 5. Once the competitive bidding process has ceased and a contract has been awarded, section 552.104 will not except from disclosure either information submitted with a bid or the contract itself. *See* Open Records Decision Nos. 541 (1990), 514 (1988). The department represents that they are still in negotiation with the successful bidder as to the contractual terms and that the

disclosure of the terms of the scoring sheets will harm the department's negotiations. We conclude in order to preserve the advantages that competitive bidding offers the department in this instance, that the department may withhold the scoring sheets, under section 552.104.

The department also asserts that the proposals submitted by bidders are excepted under section 552.110 as the vendors have "significant trade secret/proprietary information interests" in the documents. Section 552.110 excepts from disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision."

The Texas Supreme Court has adopted the definition of "trade secret" from the Restatement of Torts, section 757, which holds a "trade secret" to be:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958).<sup>1</sup> If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no one submits

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<sup>1</sup>In Open Records Decision No. 494 (1988), six factors are outlined which are used in determining whether particular information constitutes a trade secret:

1. the extent to which the information is known outside of the company's business;
2. the extent to which it is known by employees and others involved in the company's business;
3. the extent of measures taken by the company to guard the secrecy of its information;
4. the value of the information to the company and to its competitors;
5. the amount of effort or money expended by the company in developing this information;
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. In the instant case, the department asserts that although it has no direct trade interest in the content of the proposal, the vendors may have significant trade secret/proprietary interests in the documents.

We note that neither the department, nor the one vendor response, addressed the six criteria which are used in evaluating whether particular information constitutes a trade secret.<sup>2</sup> The general statements made by the department and the vendor are not responsive to the criteria as outlined in Open Records Decision No. 494 (1988). Therefore, none of the information is excepted from disclosure under the trade secret prong of section 552.110. See Open Records Decision No. 184 (1978) at 2.

In addition to the department's assertion of trade secret, it also asserts that the information should be withheld under the exceptions claimed as "commercial or financial information." This office recently modified its interpretation of the second prong of section 552.110 of the Government Code. Open Records Decision No. 639 (1996).<sup>3</sup> The test for the second prong of section 552.110 is different from that of trade secrets; it considers only two factors: 1) impairment of future cooperation with a governmental entity; or 2) substantial competitive harm. *Id.*

The department asserts that the disclosure of the vendor proposals is likely to impair the government's ability to obtain necessary information in the future. The department has not indicated how the disclosure will impair the department's ability to obtain necessary information in the future. In fact, the department states it has no "direct trade secret interest in the content of these documents" and "ultimately, questions of company proprietary and trade secret concerns are those of the vendors." The information at issue was required to be submitted to the department by the vendors in order to receive consideration for the award of the contract. In fact, a review of the contract authority for the department reveals that a party has to submit a response to a request for proposal that meets or exceeds the requirements set out in statute, in addition to the requirements specified in the request for proposals. Gov't Code §495.003.

Open Records Decision No. 639 (1996) places the burden on the party seeking to prevent disclosure to show by specific factual or evidentiary material, not conclusory or generalized allegations that it actually faces competition and that substantial competitive injury will likely result from disclosure. One vendor's assertions comprised little more

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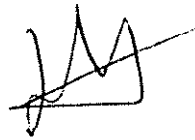
<sup>2</sup>It is also noted upon review of the proposals, one document, the Wackenhut corrections proposal, evidences a non-disclosure statement in the preface to its proposal. Information is not confidential merely because one submitting it marks it as confidential, so we cannot view this statement as dispositive as to the issue of confidentiality. Open Records Decision No. 575 (1990).

<sup>3</sup>Notice of the modification was provided to the vendors. The vendors were allowed twenty-one additional days from receipt of the modification notice to submit supplementary briefing as to why any commercial or financial information should be excepted from disclosure under section 552.110 based on the standards set out in Open Records Decision No. 639 (1996). None of the vendors submitted additional briefing in response to the notification.

than generalized allegations that the materials were developed at a significant expense for the purpose of bidding competitively for a state contract. Accordingly, neither the department nor the vendor has met its burden in invoking the second prong of the 552.110 exception so we therefore conclude that the department must disclose the vendors' proposals in their entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Janet I. Monteros  
Assistant Attorney General  
Open Records Division

JIM/rho

Ref.: ID# 37840

Enclosures: Submitted documents

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